

THIS DISPOSITION IS NOT CITABLE AS PRECEDENT  
OF THE TTAB MARCH 30,99

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re PH Pure Health

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Serial No. 75/056,874

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Faye L. Mattson and Steven P. Berreth of Christensen O'Connor  
Johnson & Kindness for PH Pure Health.

Alec Powers, Trademark Examining Attorney, Law Office 105 (Thomas  
G. Howell, Managing Attorney).

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Before Seeherman, Hohein and Chapman, Administrative Trademark  
Judges.

Opinion by Hohein, Administrative Trademark Judge:

PH Pure Health has filed an application to register the  
term "SUPER ALKALINE" as a trademark for "chemicals, namely,  
alkaline and acidic water for use in food processing and  
preserving, industrial waste and agriculture" in International  
Class 1; "alkaline and acidic water for use as a topical  
disinfectant" in International Class 5; and "water and  
electrolysis distilling units for producing alkaline or acidic

water for use in agriculture, food processing, industrial waste treatment, and topical disinfectants" in International Class 11.<sup>1</sup>

Registration has been finally refused under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the basis that, when used in connection with applicant's goods, the term "SUPER ALKALINE" is merely descriptive of them.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register, but only to the extent that the merely descriptive term "ALKALINE" must be disclaimed apart from the mark "SUPER ALKALINE" as a whole.

The Examining Attorney, in support of his position, relies upon the following definitions from Webster's II New Riverside University Dictionary (1994):

"super," which is defined in pertinent part as "**3.** An article or product of superior size or quality"; and

"alkaline," which is listed in relevant part as "**1.** Of, relating to, or containing an alkali."<sup>2</sup>

In view thereof, the Examining Attorney maintains that applicant's "SUPER ALKALINE" mark "merely describes a feature, characteristic and/or quality of the goods, namely, that the goods contain alkaline in an unusually high proportion or of a

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<sup>1</sup> Ser. No. 75/056,874, filed on February 12, 1996, which alleges a bona fide intention to use such term in commerce.

<sup>2</sup> The same dictionary, we note, defines "alkali" as "**1.** Chem A carbonate or hydroxide of an alkali metal, whose aqueous solution is bitter, slippery, caustic and typically basic in reactions. **2.** Any of various soluble mineral salts in natural water and arid soils. **3.** An alkali metal."

superior quality." Stated otherwise, the Examining Attorney views such mark as nothing more than the combination of the laudatory term "SUPER" with the name of the principal ingredient in or product produced by applicant's various goods, namely, "ALKALINE".

Applicant, on the other hand, argues that the mark "SUPER ALKALINE," when considered in its entirety, "does not automatically identify to the relevant purchasing public a feature of the goods." In particular, applicant refers to its initial response to the refusal to register, in which it stated that its alkaline and acidic water, and equipment for producing such products, "are not goods that are usually offered in various grades or qualities, nor are they goods that come in different sizes". The term "SUPER ALKALINE," applicant maintains, is thus not merely descriptive of its goods.

As applicant also notes, there are a number of cases which involve marks containing the word "super," including: In re Carter-Wallace, Inc., 222 USPQ 729, 730 (TTAB 1984) ["SUPER GEL" held merely descriptive of a "lathering gel for shaving" because term "would be perceived as nothing more than the name of the goods modified by a laudatory adjective indicating the superior quality of applicant's shaving gel"]; In re Samuel Moore & Co., 195 USPQ 237, 241 (TTAB 1977) ["SUPERHOSE!" found merely descriptive of "hydraulic hose made of synthetic resinous materials" since term "would be understood as the name of the goods modified by a laudatory adjective which would be taken to mean that applicant's hose is of superior quality or strength"];

In re Ralston Purina Co., 191 USPQ 237, 238 (TTAB 1976) ["SUPER" in "RALSTON SUPER SLUSH" ("SLUSH" disclaimed) held suggestive of a "concentrate used to make a slush type soft drink" since the term "is used as mere puffery ... to connote a vague desirable characteristic or quality"]; Quaker State Oil Refining Corp. v. Quaker Oil Corp., 453 F.2d 1296, 172 USPQ 361, 363 (CCPA 1972) ["SUPER BLEND" held merely descriptive of "motor oils" as designating "an allegedly superior blend of oils"]; and In re Occidental Petroleum Corp., 167 USPQ 128 (TTAB 1970) ["SUPER IRON" found suggestive of "soil supplements" since "it takes some roundabout reasoning to make a determination ... that the product contains a larger amount of iron than most soil supplements or that this iron ... ingredient ... is superior in quality to iron found in other soil supplements"]. According to applicant:

Under these cases, if the word "Super" is not combined with the name of the goods, or if the goods do not come in various grades or sizes, then the mark is suggestive and not merely descriptive. In Appellant's situation, the word "Super" is not combined with the name of the goods and the goods do not come in various grades or sizes. Appellant's mark, therefore, under the "Super" line of cases is not merely descriptive. ....

Applicant further contends that the definition of the word "alkaline" provided by the Examining Attorney "in and of itself requires the consumer to go through a multi-stage reasoning process even before it is associated with Appellant's goods." Specifically, applicant insists that a purchaser must first know what an alkali is and that:

Once the consumer becomes educated as to what an alkali is, the second step is to determine what the relationship between alkaline and

the alkali is since the ... Examiner's definition offers three choices: "of," "relating to," or "containing." It is only after making these determinations that the consumer can evaluate the association between the mark and the goods. ....

In addition, applicant points to the absence of any evidence in the record that competitors in the field either use the terminology "SUPER ALKALINE" or would otherwise need such term in order to identify similar products adequately.

It is well settled that a term is considered to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it immediately describes an ingredient, quality, characteristic or feature thereof or if it directly conveys information regarding the nature, function, purpose or use of the goods or services. See *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the goods or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or idea about them. Moreover, whether a term is merely descriptive is determined not in the abstract but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use. See *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). Consequently, "[w]hether consumers could guess what the product [or service] is from consideration of the mark alone

is not the test." In re American Greetings Corp., 226 USPQ 365, 366 (TTAB 1985).

However, a mark is suggestive if, when the goods or services are encountered under the mark, a multistage reasoning process, or the utilization of imagination, thought or perception, is required in order to determine what attributes of the goods or services the mark indicates. See, e.g., In re Abcor Development Corp., supra at 218, and In re Mayer-Beaton Corp., 223 USPQ 1347, 1349 (TTAB 1984). As has often been stated, there is a thin line of demarcation between a suggestive mark and a merely descriptive one, with the determination of which category a mark falls into frequently being a difficult matter involving a good measure of subjective judgment. See, e.g., In re Atavio, 25 USPQ2d 1361 (TTAB 1992) and In re TMS Corp. of the Americas, 200 USPQ 57, 58 (TTAB 1978). The distinction, furthermore, is often made on an intuitive basis rather than as a result of precisely logical analysis susceptible of articulation. See In re George Weston Ltd., 228 USPQ 57, 58 (TTAB 1985).

Strictly speaking, none of applicant's goods is itself an alkali and, thus, the term "alkaline" does not name either applicant's water or its distillation units for producing such water. However, contrary to applicant's contentions, the word "alkaline" in applicant's "SUPER ALKALINE" mark does immediately describe, without conjecture or speculation, a significant ingredient, quality, characteristic or feature of its various alkaline water products as well as directly conveying information regarding the nature, function, purpose or use of its distilling

units for producing alkaline water. Purchasers and potential customers for such goods would plainly know that alkaline products, including alkaline water and equipment for producing such, respectively contain alkali or relate thereto and, hence, would not need to become "educated as to what an alkali is". Instead, there simply is no question that the term "alkaline" merely describes applicant's goods and that any other producer of alkaline water and distilling units for producing alkaline water would need to utilize such word to describe their goods. Water which contains alkali, as well as distilling units which produce such water, are plainly and aptly described as alkaline products.

Nevertheless, as to the word "super," there is nothing in the record which contradicts or otherwise calls into question applicant's statement that its alkaline and acidic water, and equipment for producing the same, "are not goods that are usually offered in various grades or qualities, nor are they goods that come in different sizes". We are constrained, therefore, to concur with applicant that customers for its products would not immediately or directly regard the term "SUPER ALKALINE" as describing any significant quality or other attribute of applicant's goods, such as the concentration of its alkaline water or the high purity thereof. Instead, purchasers, users and/or prospective buyers of applicant's goods would have to pause and reflect on the significance of the term "SUPER ALKALINE" in order to understand its use as possibly connoting some vague desirable aspect of its products. See, e.g., In re Ralston Purina Co., supra, and In re Occidental Petroleum Corp.,

supra. Nothing, in short, indicates that applicant's products are superior in any sense; rather, the term "SUPER ALKALINE," on this record, seems to be just puffery which would leave customers for the goods to speculate as to what particular quality or function the term refers.

As applicant argues, this is not a case in which the laudatory term "super" has been combined with only a generic name for its goods. Furthermore, although not required in order to preclude registration, there is no showing of any third-party use of the terminology "super alkaline" to describe goods of the type to be offered by applicant under the mark "SUPER ALKALINE". There is thus no reason to conclude that the word "super," when used in applicant's mark, is simply a laudatory term without any source-indicating significance. Cf. In re Consolidated Cigar Co., 35 USPQ2d 1290, 1294 (TTAB 1995) ["SUPER BUY" found to be widely used as laudatory expression indicating bargains of exceptional value and therefore merely descriptive of "cigars, pipe tobacco, chewing tobacco and snuff"]. Finally, to the extent that there may still remain any doubt as to whether applicant's mark is merely descriptive or suggestive of its goods, such doubt is resolved, in accordance with the Board's practice, in favor of applicant. See, e.g., In re Morton-Norwich Products, Inc., 209 USPQ 791 (TTAB 1981) and In re Gourmet Bakers, Inc., 173 USPQ 565 (TTAB 1972).

Consequently, while we find that the word "ALKALINE" clearly is merely descriptive of applicant's goods and must be disclaimed in order for the mark "SUPER ALKALINE" to be



registrable, we hold that such mark, when considered as a whole, is not on this record merely descriptive of applicant's products.<sup>3</sup>

**Decision:** The refusal under Section 2(e)(1) is affirmed, but only to the extent that the merely descriptive term "ALKALINE" must be disclaimed. In accordance with Trademark Rule 2.142(g), this decision will be set aside and applicant's "SUPER ALKALINE" mark will be published for opposition if applicant, no later than thirty days from the mailing date hereof, submits an appropriate disclaimer of the term "ALKALINE".<sup>4</sup>

E. J. Seeherman

G. D. Hohein

B. A. Chapman  
Administrative Trademark Judges,  
Trademark Trial and Appeal Board

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<sup>3</sup> It should, of course, be kept in mind that this appeal involves an intent-to-use application and that we have reached our conclusion based upon a very sparse record. Once applicant submits a statement of use and accompanying specimens of actual use, the Examining Attorney, in the examination thereof, may revisit the issue of mere descriptiveness. Imposition of such a refusal, based upon information disclosed by the specimens of use (which, of course, are not presently available), is not precluded by our decision at this juncture.

<sup>4</sup> See In re Interco Inc., 29 USPQ2d 2037, 2039 (TTAB 1993). For the proper format for a disclaimer, attention is directed to TMEP §§1213.09(a)(i) and 1213.09(b).